No.

IN THE

Supreme Court of the United States

GARY S. WEBBER, PETITIONER

v.

INTERNATIONAL PAPER COMPANY

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

Gary Webber brought the instant claim of disability discrimination when his employer, International Paper Company ("IP"), chose him to be the first of only two people fired in a company reorganization, although there was an open and available position as an SQA coordinator within the IP mill at Bucksport, Maine, to which Mr. Webber could have been reassigned as had almost every other employee whose position was nominally eliminated. In discovery, IP falsely claimed that the SQA coordinator position was filled at the time Mr. Webber was fired, and only at trial was it established that the position had been open. Mr. Webber was qualified for the position, and IP had, only after being faced with a charge of employment discrimination, belatedly offered the position to Mr. Webber.

At the conclusion of discovery, IP moved for summary judgment, principally on the grounds that Mr. Webber was not disabled and that the claimed reason for his discharge (the lack of an engineering degree) could not be found by a rational jury to be pretextual. The Magistrate Judge, in a decision affirmed by the Article III judge, found, at a minimum, that IP regarded Mr. Webber as disabled (Supreme Court Appendix p. 38a, hereinafter A-38a), and that IP's stated reason for Mr. Webber's discharge could be found, by a rational jury, to be pretextual. A-39a-41a.

Only at trial did IP concede that Mr. Webber was a qualified individual with a disability and, thereafter, the focus of the trial was whether the disability or the lack of an engineering degree was the

real reason for the termination. At both the close of plaintiff's case and the close of the evidence, the trial court denied motions for judgment as a matter of law and the jury returned a verdict which, when reduced to reflect the applicable damage caps, reflected an award of compensatory damages of $300,000.00. A-58a. Post-verdict, for the first time, IP argued that Mr. Webber had never established that any of the retained employees were non-disabled and so had never established a *prima facie* case. The trial court dismissed this argument in a footnote, noting that IP had failed "to include the argument in its initial motion for judgment as a matter of law." A-90a. The trial court then disagreed with the jury's verdict (and its earlier decision affirming the Magistrate Judge's denial of IP's motion for summary judgment) by holding that no rational jury could have found the true reason for Mr. Webber's dismissal was his disability. A-88a.

The First Circuit affirmed, laying great emphasis on the alleged failure to demonstrate that the favored employees who were retained were not disabled. A-5a-9a.

Fundamentally, this emphasis on the sharp dichotomy between disabled/non-disabled is as ill-chosen as the attempt to delineate the gradations of age in the context of an age discrimination claim. Just as a successful age discrimination litigant need not show that the employee who replaced him was under the age of 40, the successful disability plaintiff need not show that all of the favored employees were free from <u>any</u> disability. To rule otherwise would allow an employer concerned about injury at the work place to refuse to hire blind employees, given their greater perceived

propensity for falling, but to hire deaf employees, who could obviously see where they were walking. Disability is much more akin to age and its many variations and gradations than it is to gender, where the sex of the applicant is known to all and readily ascertainable.

I. Did Mr. Webber have to show that the employees who were reassigned or retained in the company reorganization were free from any disability, whatsoever, when his claim was that he had a particular disability (a badly injured right knee) which made walking extremely difficult and created a perception that he was injury-prone, or is the imposition of a requirement upon him to show that retained employees fell outside of the protected class one which should be expressly rejected, as it was in the context of age discrimination, in this Court's decision in *O'Connor v. Consolidated Coin Caterers Corp.*, 517 U.S. 308 (1996)?

II. Does the First Circuit's opinion conflict with this Court's opinion in *Reeves v. Sanderson Plumbing Products, Inc.*, 530 U.S. 133 (2000) because it credits testimony the jury was entitled to disbelieve, weighs conflicting testimony inconsistently with the duty of deference to the jury's verdict, ignores evidence in petitioner's favor pointing to disability discrimination, and accepts the entire view of the case proffered by defendant?

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The opinion of the United States Court of Appeals for the First Circuit, reported at 417 F.3d 229 (1st Cir. 2005), is reprinted in the Appendix at A-1a. The District Court's decision denying Defendant's motion for summary judgment, reported at 239 F.Supp.2d 88 (D.Me. 2002), is reprinted in the Appendix at A-22a. The District Court's findings of fact and conclusions of law regarding equitable remedies, reported at 307 F.Supp.2d 119 (D.Me. 2004), is reprinted in the Appendix at A-49a. The District Court's order on Plaintiff's motion to amend and Defendant's motion for judgment as a matter of law or in the alternative for a new trial, reported at 326 F.Supp.2d 160 (D.Me. 2004), is reprinted in the Appendix at A-70a. The First Circuit's unreported decision denying Plaintiff's petition for panel rehearing and rehearing en banc is reprinted in the Appendix at A-91a.

JURISDICTION

The First Circuit Court of Appeals entered its order affirming the decision of the District Court for the District of Maine on August 9, 2005. On September 20, 2005, the First Circuit denied Plaintiff Gary Webber's petition for rehearing en banc. Jurisdiction is vested in the Supreme Court pursuant to 28 U.S.C. § 1254.

This is a diversity case of disability discrimination brought under the Maine Human Rights Act (MHRA). Although nominally a state law issue, because the MHRA generally tracks federal anti-discrimination statutes, the Maine courts look to federal precedent for guidance in interpreting the MHRA. *Winston v. Maine Technical College System*, 631 A.2d 70, 74 (Me. 1993). "In analyzing

the ADA and MHRA, the Court need not continuously distinguish between the two statutes as to their scope and general intent because Maine courts consistently look to federal law in interpreting state anti-discriminatory statues." *Soileau v. Guilford of Maine, Inc.*, 928 F. Supp. 37, 45 (D. Me. 1996), aff'd 105 F.3d 12 (1st Cir. 1997). As such, the Maine law is interwoven with the federal law and this Court has jurisdiction to review this case. *Michigan v. Long*, 463 U.S. 1032 (1983); *Ohio v. Reiner*, 532 U.S. 17 (2001).

STATUTORY PROVISIONS

TITLE 5. ADMINISTRATIVE PROCEDURES AND SERVICESPART 12. HUMAN RIGHTSCHAPTER 337. HUMAN RIGHTS ACTSUBCHAPTER III. FAIR EMPLOYMENT5 M.R.S.A. § 4572§ 4572. Unlawful employment discrimination 1. UNLAWFUL EMPLOYMENT.

> It is unlawful employment discrimination, in violation of this Act, except when based on a bona fide occupational qualifi ation:A. For any employer to fail or refuse to hire or otherwise discriminate against any applicant for employment because of race or color, sex, physical or mental disability, religion, age, ancestry or national origin, because of the applicant's previous assertion of a claim or right under former Title 39 or Title 39-A or because of previous actions taken by the applicant that are protected under Title 26, chapter 7, subchapter V-B; or, because of those reasons, to discharge an employee or discriminate with respect to hire, tenure, promotion, transfer,

compensation, terms, conditions or privileges of employment or any other matter directly or indirectly related to employment; or, in recruiting of individuals for employment or in hiring them, to utilize any employment agency thatthe employer knows or has reasonable cause to know discriminates against individuals because of their race or color, sex, physical or mental disability, religion, age, ancestry or national origin, because of their previous assertion of a claim or right under former Title 39 or Title 39-A or because of previous actions that are protected under Title 26, chapter 7, subchapter V-B;

2. UNLAWFUL DISCRIMINATION AGAINST QUALIFIED INDIVIDUAL WITH A DISABILITY.

A covered entity may not discriminate against a qualified individual with adisability because of the disability of the individual in regard to job application procedures, the hiring, advancement or discharge of employees, employee compensation, job training and other terms, conditions and privileges of employment. A qualified individual with a disability, by reason of that disability, may not be excluded from participation in or be denied the benefits of the services, programs or activities of a public covered entity, or be subjected to discrimination by any such covered entity relating to job application procedures, the hiring, advancement or discharge of employees, employee compensation, job training and other terms, conditions and privileges of employment.

STATEMENT

Plaintiff/Petitioner, Gary Webber (hereinafter "Petitioner"), through his attorneys and pursuant to Supreme Court Rule 10, hereby petitions for a writ of *certiorari* to the United States Court of Appeals for the First Circuit.

The First Circuit's decision conflicts with two decisions of this Court, *Reeves v. Sanderson Plumbing Products, Inc.*, 530 U.S. 133 (2000), and *O'Connor v. Consolidated Coin Caterers Corp.*, 517 U.S. 308 (1996). The First Circuit's decision conflicts with *Reeves* because it credits testimony the jury was entitled to disbelieve, weighs conflicting testimony inconsistently with the duty of weighing testimony in light of a jury verdict in favor of Petitioner, and ignores evidence in Petitioner's favor which points to disability discrimination as the motivating factor for Petitioner's termination. The First Circuit decision also conflicts with *O'Connor* because it holds that a disability discrimination plaintiff must show that favored employees fell outside of the protected class in order to state a prima facie case, a notion which was expressly rejected in the context of age discrimination in *O'Connor*.

Gary Webber claimed that International Paper discriminated against him on the basis of his disability when it terminated his employment on June 25, 2001. International Paper's post-discovery motion for summary judgment was denied in a recommended decision of the Magistrate Judge which was affirmed by the District Judge after *de novo* review. A-22a-48a. A jury trial was held in October 2003, during which International Paper twice moved for judgment as a matter of law. Both of those motions were denied, and the jury returned a

verdict in favor of Mr. Webber. However, on June 9, 2004, the District Court entered an order granting International Paper's motion for judgment as a matter of law, A-70a-90a. Mr. Webber appealed to the First Circuit Court of Appeals, which had jurisdiction pursuant to 28 U.S.C. § 1291. On August 9, 2005, a three-judge panel of the First Circuit Court of Appeals affirmed the District Court judgment. A-1a-21a. On September 20, 2005, the First Circuit denied Mr. Webber's motion for rehearing en banc. A-91a.

Gary Webber began working for International Paper and its predecessors (hereinafter collectively referred to as "IP") in November 1983 as a mechanical draftsman and moved up into an engineering position as of 1987.[1] From the first day Gary Webber worked for IP, he heard a motto that "salaried people do not get hurt."[2] Appendix to First Circuit brief, page A-80 (hereinafter referred to as A-__).[3]

Mr. Webber injured his knee at the mill in 1997, A-79-80, and had several surgeries on his knee. After over a year of delay, A-96-100, A-198-199, IP installed a stair glide chair for Mr. Webber to traverse part of one flight of two flights of stairs. That chair glide was dubbed the

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[1]Although Mr. Webber does not have an engineering degree, he was fully capable of performing his work and received favorable evaluations throughout his career at IP.

[2]Steve Moser, Plaintiff's third-line supervisor, confirmed that he had heard that phrase at IP before. A-291.

[3]References to the Supreme Court appendix are distinguished by the suffix "a" after the page number.